Dismissed

Supreme Court, U. S.
FILED
OCT 6 1975
MICHAEL RODAK, JR., CLERK

THE SUPREME COURT
OF THE
UNITED STATES

Donald H. Stephens
Appellant
v
L. D. Howle
Appellee

Case No. 74-1475

APPELLANT'S REPLY BRIEF

Donald H. Stephens
Appearing Pro se, Appellant
R. 3 Box 18
Sandersville, Ga. 31082

Warren W. Wills, Jr.
Attorney for Appellee
640 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30303

CASES CITED

Amsterdam v Russell 103 GaA.556, 120 SE^{2nd} 150	p. 1
Milton v U. S. 105 F^{2nd} 253	p. 2
Twilley v Twilley 195 Ga R. 298 24 SE^{2nd} 46	p. 1
U. S. v M. H. A. 185 F^{2nd} 283	p. 2
Walker v Walker 53 GaA. 769 187 SE 164(166)	p. 6
West's Words and Phrases Volume 16A pages 148-159	p. 2
Williams v Georgia 349 US 375 99 Led 1161, 75 Sct 814	p. 5
Williams v Kaiser 323 US 471(478-479) 89 Led 398(403-404)	p. 5
Wolfe v N. C. 364 US 177(185) 4 Led^{2nd} 1650(1657), 80 Sct 1482	p. 6
Ga. Code Anno. 6-1002	p. 1
Ga. Code Anno. 24-4534	p. 2
Ga. Code Anno. 24- 4537(b)	p. 2
Rule 39(4)of this Court	p. 3

(a) THE APPEAL WAS TIMELY FILED.

The decision was entered on Dec. 5, 1974. However a motion for rehearing and application for certiorari to a higher court stays the running of the period in which to file an appeal. Certiorari review was not complete nor was the denial thereof legally effective in the Court of Appeals untill Feb. 11, 1975, the date remittitur was received by the Court of Appeals. In Georgia a decision of a higher court is not legally effective in the lower court untill remittitur is recieved in the lower court. Twilley v Twilley, 195 GaR. 298, 24 SE^{2nd} 46, and Amsterdam v Russell, 103 GaA. 556, 120 SE^{2nd} 150, held: "A judgment can not be treated as final so long as either of the parties thereto have, the right to have the same reviewed by the Supreme Court (of Georgia); and if it is so reviewed it is not final untill their judgment is made the judgment of the trial court." Indeed appellant would have been in contempt of the automatic writ of supersedeas in effect in this case, if he had treated the decision as final and appealed to the U. S. Supreme Court before this date. See Ga. Code Anno. 6-1002

The jurisdiction of the case was in the breast of the Supreme Court of Georgia, and the record in the case was temporarily in possession of said Court through, Monday, Feb. 10, 1975. The denial and record was then transmitted back to the Court of Appeals on Feb. 11, 1975. See Ga. Code Anno. 24-4537(b) & 24-4534. Appellant had no authority to file an appeal untill the Court of Appeals reacquired jurisdiction of the case, or untill the Court reacquired possession of the record, or untill the Court's decision became final.

The record and the notice of appeal was filed in the United States Supreme Court within the time for filing an appeal. The jurisdictional statement was served upon appellee's attorney within the time for filing an appeal. (See Affidavit) The original jurisdictional statement (although not printed) was filed in this Court within the time for filing an appeal; it was received by the clerk on May 7, 1975. (See Exhibit 2) " The lodging of a petition with the clerk to be filed is a filing." Milton v U. S. 105 F^{2nd} 253, U. S. v M. H. A. 185 F^{2nd} 283 (more cases West's Word and Pharses vol. 16A pages 148-159)

However printed copies of the jurisdictional statement was not filed untill

after the period for filing an appeal. The failure to meet legibility or printing requirement is not a jurisdictional defect as claimed by appellee, and the case should not be dismissed on this ground. The duty to correct such defects have been delegated to the clerk of this Court. Rule 39(4) states: "... If papers are filed in a form which is not clearly legible, the clerk will require that new copies be substituted, but the filing shall not thereby be deemed untimely." Appellant did show that the delay was beyond appellant's control and requested (applied) for additional time to meet the printing requirement in his letter dated May 2, 1975. the request was filed within the period in which an appeal is allowed. (Exhibit 1)

THE DECISION DRAWS IN QUESTION UNCONSTITUTIONAL STATUTES

If the decision of the Court of Appeals held anything it held that appellee introduced evidence that appellant committed a crime and the burden was upon appellant to rebut this. the only evidence introduced in this respect involved constitutional protected speach of appellant. Certainly this draws in question the constitutionality of the statutes appellant allegily violated.

(b) THE CONSTITUTIONAL QUESTION WAS PROPERLY PRESENTED.

As is pointed out in the jurisdictional statement, appellee did not plead in his affirmative defense any statute that he contended appellant violated, not did he supply this information in response to interrogatories. Thus it was impossible to raise the issue at the trial because appellant was not given proper notice of the statutes he allegedly violated. The law should not require that which is impossible to perform.

Furthermore the issue of the sufficiency of the evidence was raised by appellee when he argued in his reply brief: "In this case, Appellee assumed any burden placed upon him, meeting and rebutting any prima facie case made by Appellant or allowed to Appellant."

Appellee had a right to argue the trial court judgment was correct upon grounds other than those raised in the appeal.

The Court of Appeals had a right to substain the trial court on grounds other than those raised in the appeal. The Court of Appeals did this.

However appellant had a right to argue that this ground was without merit. The

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motion for reconsideration was a proper method for doing this. Appellant did this by attacking the constitutionality of the statutes in his motion.

To deny consideration of appellant's argument because the issue was not raised in the trial court would be repugnant to due process. It allows the Court of Appeals to erroneously subtain the judgment of the trial court upon grounds of which appellant has not been given an opportunity to be heard. Due process requires that both parties be heard.

This was the holding in Williams v Georgia, 349 US 375, 99 Led 1161, 75 Sct 814.

THE PRESUMPTION IS THE FEDERAL QUESTION WAS RULED ON

The federal question was the issue raised in the motion for reconsideration. Althrough the motion was denied without elaboration, the record does not show nor has appellee pointed out any independent, substantial state grounds upon which the denial could be based. Thus the presumption is that the Court of Appeals ruled on the federal question. Williams v Kaiser, 323 US 471(478-479), 89 Led 398(403 404) (additional cases cited in case) held: "If the independent state ground was not a substantial or sufficient one it will be presumed that the state based its judgment on the law raising the federal question and this Court will then take jurisdiction." See also Wolfe v N. C., 364 US 177(185), 4 Led 2nd 1650(1657), 80 Sct 1482.

THE QUESTION OF CONFLICTING JURISDICTION WAS PROPERLY RAISED

Appellee was not the person sued or served in the main suit, nor did he waive jurisdiction. Appellant attacked the judgment in a seperate legal proceeding, the new trial proceeding. Appellant is not estopped from attacking a judgment even if obtained by him as being void for want of jurisdiction over the person or for lack of service on defendant in a seperate legal proceeding. Walker v Walker, 53 GaA. 769, 187 SE 164(166)

Exhibit #1,

EXHIBIT 1

Route 3 Box 18
Sandersville, Ga. 31082
May 2, 1975

Hon. Michael Rodak, Jr., Clerk
Supreme Court of the United States
Washington, D. C. 20543

Dear Sir:

This letter is in reference to the appeal of the decision of the Court of Appeals of Georgia in case #49894, Stephens V Howle.

The decision was entered on Dec. 5, 1974. Application for certiorari was denied by the Supreme Court of Georgia, and remittitur was transmitted back to the Court of Appeals on Feb. 11, 1975. The notice of appeal was filed in the Court of Appeals of Georgia on Feb. 13, 1975.

Appellant, Donald H. Stephens, Appearing pro se, hereby, enters his appearance in this case. Enclosed is a check in the amount of one hundred dollars for payment of the docket fee.

Because of appellant's inexperience in preparing printed briefs and the limited availability of qualified printers in a small town, the printed jurisdictional statement is not yet completed. They should be printed by May 10, 1975. Appellant submits a typewritten copy of the jurisdictional statement and request additional time for filing the printed copies. rule 39(4)

Please furnish any other necessary information.

Respectfully,

(S) Donald H. Stephens

Copy to:
Warren W. Wills, Jr.
Attorney for Appellee

AFFIDAVIT

Donald H. Stephens being duly sworn deposes and says:

1 That exhibit 1 is a copy of a letter mailed to the Clerk of the United States Supreme Court, receipt was acknowledged.

2 That he mailed the jurisdictional statement in this case to the Clerk of the United States Supreme Court, and that said statement was received by the clerk as is shown by exhibit 2, a copy of the return receipt of said mailing on Feb. 7, 1975.

3 That he served Warren W. Wills, Jr., attorney for appellee, with a copy of the jurisdictional statement by properly mailing the same to him on Feb. 6, 1975.

4 That he has served Warren W. Wills, Jr., attorney for appellee, 3 copies of this pleading by properly mailing the same to him.

Subscribed and sworn to before me this day of Oct. 1975

_____
N. P.

EXHIBIT 2

● SENDER: Complete items 1 and 2. Add your address in the "RETURN TO" space on reverse.

1. The following service is requested (check one).
☐ Show to whom and date delivered..... 15¢
☐ Show to whom, date, & address of delivery.. 35¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom and date delivered..... 65¢
☐ DELIVER ONLY TO ADDRESSEE and show to whom, date, and address of delivery ..... 85¢

2. ARTICLE ADDRESSED TO:

3. ARTICLE DESCRIPTION:
REGISTERED NO. | CERTIFIED NO. 13578 | INSURED NO.

(Always obtain signature of addressee or agent)
I have received the article described above.
SIGNATURE

4. DATE OF DELIVERY MAY - 7 1975 POSTMARK

5. ADDRESS (Complete only if requested) CLERK'S OFFICE SUPREME COURT, U.S.

6. UNABLE TO DELIVER BECAUSE:

CLERK'S INITIALS

PS Form 3811, Nov. 1973 RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

• GPO : 1974 O - 537-503

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